PP

v.

TIA AH LENG

HIGH COURT MALAYA, KUALA LUMPUR
AUGUSTINE PAUL J
[CRIMINAL TRIAL NO: 45-27-98]
28 FEBRUARY 2000

CRIMINAL PROCEDURE: *Sentence - Dangerous Drugs Act 1952, s. 39A(2) - Possession of large quantity of dangerous drugs - Whether maximum sentence should be imposed - Guilty plea - Whether a mitigating factor - Whether surpassed by public interest*

The accused pleaded guilty to an amended charge under s. 12(2) of the Dangerous Drugs Act 1952 ('the Act') with possession of 13,749.8g of heroin punishable under s. 39A(2) of the Act. The prescribed punishment under the latter section was imprisonment for life or for a term which shall not be less than five years and whipping not less than ten strokes.

In his plea of mitigation, the accused claimed: (i) that he was 47 years of age and married with four children; (ii) that he was the sole breadwinner in the family; and (iii) that he had pleaded guilty.

Held:

[1] One of the main considerations in the assessment of sentences is the question of public interest. It is left to the discretion of the court to pass an appropriate sentence within the prescribed maximum dependant on the particular circumstances of the case.

[2] The seriousness of the drug menace must be reflected in the sentence, depending on the circumstances of the case so that the requirements of public interest can be served effectively. The weight of the drugs is an indication of the gravity of the offence though it may be mitigated.

[3] A plea of guilt will operate as a mitigating factor in favour of the accused. However, the demands of public interest may, in the circumstances of a particular case, far outweigh any mitigating effect which might have attached to an accused's guilty plea.

[4] The accused was of a sufficient age to realise the seriousness of his conduct. There was no evidence to suggest that he was in possession

of the drugs for his own use or that he was an intermediary. On the other hand, the unusually large quantity of drugs was evidence of his motive and showed his degree of involvement. It constituted a potential for damage to the community as well as being an indicator of the gravity of the offence.

[5] In the interests of the public, the maximum prison term should be imposed on the accused. It followed that the guilty plea of the accused could not operate as a mitigating factor in his favour.

[Accused convicted and sentenced to life imprisonment plus ten strokes of the whip.]

Cases referred to:
Ang Chai Seng v. PP [2000] 1 CLJ 213 ***(refd)***
Bensegger v. R [1979] WAR 65 ***(refd)***
Loh Hock Seng & Anor v. PP [1980] 2 MLJ 13 ***(refd)***
New Tuck Shen v. PP [1982] 1 MLJ 38 ***(refd)***
Phillip Lau Chee Heng v. PP [1988] 3 MLJ 107 ***(refd)***
PP v. Darmalingam [1987] 2 MLJ 529 ***(refd)***
PP v. Govindnan Chinden Nair [1998] 2 MLJ 181 ***(refd)***
PP v. Jafa Daud [1981] 1 MLJ 315 ***(refd)***
PP v. Loo Choon Fatt [1976] 2 MLJ 256 ***(refd)***
PP v. Ravindran & Ors [1993] 1 MLJ 45 ***(refd)***
PP v. Sulaiman bin Ahmad [1993] 1 MLJ 74 ***(refd)***
R v. Ambler [1976] Crim LR 266 ***(refd)***
R v. Harrison [1909] 2 Cr App R 94 ***(refd)***
R v. Laurentiu and Bechru [1992] 63 A Crim R 402 ***(refd)***
R v. Short [1994] 49 FCR 556 ***(refd)***
R v. Tait and Bartley [1979] 24 ALR 473 ***(refd)***
R v. Wangsaimas, Vanit and Tensakum [1996] 6 NTLR 14 ***(refd)***
Re Chong Cheng Hoe & Ors [1966] 2 MLJ 252 ***(refd)***
Sau Soo Kim v. PP [1975] 2 MLJ 134 ***(refd)***
Sia Ah Kew & Ors v. PP [1974] 1 MLJ 125 ***(refd)***
Sim Gek Yong v. PP [1995] 1 SLR 537 ***(refd)***
Zaidon Shariff v. PP [1996] 4 CLJ 441 ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 183
Dangerous Drugs Act 1952, ss. 12(2), 39A(2)(b), 39B(1)(a), (2)

Other source referred to:
Sentencing: State and Federal Law in Victoria, Fox and Freiberg, 2nd Edn, pp 236, 1009

For the prosecution - Azhar Abdul Hamid, DPP
For the accused - Gurbachan Singh (Harcharanjit Singh with him); M/s Bachan & Kartar

Reported by Usha Thiagarajah

JUDGMENT

Augustine Paul J:

Tia Ah Leng ("the accused") was originally charged with trafficking in 13,749.8 grammes of heroin under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ("the Act") and punishable under s. 39B(2) of the Act. At the close of the case for the defence the charge was amended to one under s. 12(2) of the Act in respect of the same amount of heroin and punishable under s. 39A(2) of the Act. The prescribed punishment under the latter section is imprisonment for life or for a term which shall not be less than five years and whipping of not less than ten strokes. The accused pleaded guilty to the amended charge and understood the nature and consequences of his plea.

Briefly stated, the facts of the case are that the wife of the accused, Lew Sin Kiow, was the owner of premises number 39, Jalan Hujan Emas, OUG, Kuala Lumpur ("house No 39"). She stayed at premises number 41, Jalan Hujan Emas, OUG, Kuala Lumpur ("house No 41") with her family. On 25 March 1997 she entered into a sale and purchase agreement with one Chan Poh Lan for the sale of house No 39 to the latter. Chan Poh Lan took the keys to house No 39 from Lew Sin Kiow to carry out some renovation works and returned the keys after the completion of the works as the full purchase price had not been paid yet. On 20 August 1997 Chan Poh Lan obtained the keys from her solicitors. Prior to this the accused had purchased a motor car from one Aw Ka Theam between the end of 1995 and early 1996. The motor vehicle was a BMW with registration number WCV 2088. Aw Ka Theam gave the accused the registration card (exh. P8) of the car, a signed Form K3 which is the transfer form for the car and a photostat copy of his identity card. He believed that with these documents the accused would effect the transfer of ownership of the car into his own name. However, exh. P8 reveals that it has still not been done. In cross-examination Aw Ka Theam disagreed that he had never sold the car to the accused.

On 1 June 1997 assistant superintendent of Police Perumal s/o Alagan was attached to the narcotics department of the police headquarters. Upon receipt of information relating to drug activities involving two houses and a car in Jalan Hujan Emas, Taman OUG, Jalan Kelang Lama, Kuala

Lumpur he gave a briefing to his officers on that day at 8.00 p.m. The officers involved were ASP Mohd Rodzi bin Rejab, Det/Sjn Haji Kassim, Det/Cpl Abdul Malik bin Jaafar, Det/Cpl Othman bin Baba, Det/Cpl Khalid bin Hassan, Det/Cpl Palaniandy s/o Muniandy, Det L/Cpl Badrin bin Majid, Det L/Cpl Rahim bin Kiran and Det L/Cpl Zaini bin Hussein. He divided the officers into three groups. The first group consisting of Det/Cpl Palaniandy and Det L/Cpl Zaini was headed by him; the second group consisting of Det/Cpl Khalid and Det L/Cpl Badrin was headed by ASP Mohd Rodzi and the third group consisting of Det/Cpl Abdul Malik, Det/Cpl Othman and Det L/Cpl Rahim was headed by Det/Sjn Haji Kassim. At about 9.00 p.m. on that day the three groups arrived at the scene and identified the houses. After an observation carried out for about 15 – 20 minutes ASP Perumal found that house No 39 and house No 41 were double storey semi-detached houses. Attached to house No 39 was premises No 37. He noticed that the upstairs of house No 39 was dark while its ground floor had lights. Parked at the porch of house No 39 was motor car No WCV 2088. The gate of the house was closed. House No 41 was bright as it had lights. Two cars were parked at this house. They were motor car numbers WBD 22 and WCX 3015. The gate to the house was closed. ASP Perumal noticed movement of people in the front portion of the house. He then instructed his officers to take up their respective positions. His group was to go into house No 41 while ASP Mohd Rodzi's group was to go into house No 39. Det/Cpl Abdul Malik and Det L/Cpl Rahim were to do guard duty in front of premises No 43 while Det/Sjn Haji Kassim and Det/Cpl Othman were to do guard duty at the back of house No 39 and house No 41.

At about 9.40 p.m. ASP Mohd Rodzi and ASP Perumal started entering into the respective premises. Together with Det/Cpl Palaniandy and Det L/Cpl Zaini ASP Perumal climbed over the fence of house No 41. They identified themselves by shouting, "Polis, Polis, Polis". ASP Perumal then saw a person, wearing a pair of short pants and without a shirt on, running from the front of house No 41 towards the wall between house No 41 and premises No 43. He and his officers shouted "Orang lari, Orang lari". While Det/Cpl Palaniandy ran in the direction of the person ASP Perumal and Det L/Cpl Zaini went into house No 41 and arrested a male Chinese named Lew Sin Siong who was running up the staircase. At that time Det/Cpl Palaniandy informed ASP Perumal that the other male person who had tried to run away had been arrested. He is the accused. Det/Cpl Abdul Malik and Det L/Cpl Rahim then brought the accused who was in a pair of short pants and with no shirt on. He was in handcuffs. ASP Perumal was also handed a bunch of four keys (exh. P17). One of the keys in the bunch looked like a car ignition key.

I pause for a moment to narrate the manner in which the accused was arrested. Det/Cpl Abdul Malik and Det L/Cpl Abdul Rahim were on duty at their assigned position. Det/Cpl Abdul Malik said that he heard the shouts of "Polis, Polis, Polis" and "Orang lari, Orang lari". He then saw a male person in a pair of short pants and without a shirt on. He gave the following warning: "Polis, Polis. Jangan lari. Nanti saya tembak". He said that he saw the person climbing over the wall and coming down. The person then turned towards him. Det L/Cpl Abdul Rahim saw the person putting his right hand into his pocket and throwing something on the grass in front of him. He then raised up both his hands. Det/Cpl Abdul Malik instructed Det L/Cpl Abdul Rahim to handcuff the person. He is the accused. Det/Cpl Abdul Malik asked the accused what it was that he had thrown but he did not say anything. They then searched the area where the accused had thrown the thing with a torchlight and recovered exh. P17. They then handed exh. P17 and the accused to ASP Perumal.

When the accused was questioned regarding exh. P17 he led ASP Perumal and some other officers towards the direction of motor car number WCV 2088. Lew Sin Siong was also taken there. Upon arrival ASP Perumal opened the front door at the driver's side of the car with the car ignition key in Exhibit P17. He examined the inside of the car in the presence of the accused and Lew Sin Siong. He did not find any incriminating items there though he recovered the car registration card (exh. P8) and a document (exh. P18) from Kurnia Insurance. He then went to the boot of the car. Witnessed by the accused and Lew Sin Siong he tried to open the boot with the same key. He did not succeed in doing so. He then asked Det/Cpl Khalid to open the boot as he is familiar with BMW cars. He too did not succeed. ASP Perumal then asked the accused to open the boot. At first he refused to do so. After being asked several times the accused agreed and opened the boot easily with one turn in the first attempt.

When the boot was opened ASP Perumal found in it a dark blue bag (exh. P15). The zip of the bag was half-opened and he found that it contained plastic packets. Witnessed by the accused and Lew Sin Siong ASP Perumal removed the bag from the boot and placed it on the floor of the porch. He opened the zip fully. He then took out the plastic packets one by one and arranged them in the boot. There was a total of 40 packets (exh. P13(1) to (40)). They were wrapped in plastic wrappers and cellophane tape (exh. P14(1) to (40)). He suspected that the contents of the packets were heroin. He then replaced the packets in the bag and placed it on the front passenger seat of the car. He then locked the car and instructed Det/Cpl Khalid to guard the car. He then searched house No 39 together with the

accused, Lew Sin Siong and some officers. The house was empty. They then searched house No 41 and motor cars no BED 22 and WCX 3015. Nothing incriminating was found.

At about 11.20 p.m. Det/Cpl Khalid drove motor car no WCV 2088 to Balai Polis, Jalan Travers. ASP Perumal sat on the front passenger seat. Seated at the back were the accused, Lew Sin Siong, Det L/Cpl Rahim and Det/Cpl Palaniandy. Upon arrival at the police station ASP Perumal weighed the packets and marked the packets with the marks E1 to E40 in black ink. He then made a report, being Petaling Report No 4047/97, in respect of the arrests and the seizures. Exhibits E1 to E40 were sent to the chemist for analysis who found them to contain 13,749.8 grammes of heroin. The accused admitted the facts as adduced by the prosecution and I accepted his plea.

In his plea in mitigation the accused said that he is aged 47 and is married with four children. He is the sole breadwinner in the family. He had pleaded guilty and was prepared to do so even prior to the commencement of the trial if the charge had been reduced. The accused then prayed for the sentence to run from the date of arrest. In 1982 he was convicted in Singapore for possession of dangerous fireworks for which he was fined $200. He admitted the previous conviction.

In sentencing the accused I took various factors into consideration. The provision of law that deals with the imposition of sentences in the High Court is governed by s. 183 of the Criminal Procedure Code which reads as follows:

> If the accused is convicted, the Court shall pass sentence according to law.

The phrase "pass sentence according to law" in the section means that the sentence imposed must not only be within the ambit of the punishable section but it must also be assessed and passed in accordance with established judicial principles (see *Re Chong Cheng Hoe & Ors* [1966] 2 MLJ 252; *PP v. Jafa bin Daud* [1981] 1 MLJ 315; *Phillip Lau Chee Heng v. PP* [1988] 3 MLJ 107). In *R v. Ball* 35 Cr App R 164 the principles which should guide a court in considering the appropriate sentence that should be imposed was laid down in the following terms:

> In deciding the appropriate sentence a Court should always be guided by certain considerations. The first and foremost is the public interest. The criminal law is publicly enforced, not only with the object of punishing crime, but also in the hope of preventing it. A proper sentence, passed in public, serves the public interest in two ways. It may deter others who might be tempted to try crime as seeming to offer easy money on the

> supposition that, if the offender is caught and brought to justice, the punishment will be negligible. Such a sentence may also deter the particular criminal from committing a crime again, or induce him to turn from a criminal to an honest life. The public interest is indeed served, and best served, if the offender is induced to turn from criminal ways to honest living. Our law does not, therefore, fix the sentence for a particular crime, but fixes a maximum sentence and leaves it to the Court to decide what is, within that maximum, the appropriate sentence for each criminal in the particular circumstances of each case. Not only in regard to each crime, but in regard to each criminal, the Court has the right and the duty to decide whether to be lenient or severe.

Therefore, one of the main considerations in the assessment of sentences is the question of public interest (see *PP v. Loo Choon Fatt* [1976] 2 MLJ 256; *PP v. Darmalingam* [1987] 2 MLJ 529). It is left to the discretion of the court to pass an appropriate sentence within the prescribed maximum dependent on the particular circumstances of a case. Thus the observation in *R v. Ball* that the public interest is indeed served, and best served, if the offender is induced to turn from criminal ways to honest living cannot be construed as a carte blanche argument for the avoidance of custodial sentences in all cases. This was succinctly explained by Wan Yahya J (as he then was) in *New Tuck Shen v. PP* [1982] 1 MLJ 27 at pp 30 – 31:

> The case of *R v. Ball* 35 Cr App R 164 has been widely canvassed in this court as a means for avoidance of custodial sentence. Unfortunately the sagacious observation of Hilbery J that 'public interest is indeed served, and best served, if the offender is induced to turn from criminal ways into honest living' has been used in more ways than the learned judge could ever imagine. In that case the learned judge was not laying any rules on public interest but was merely observing what public interest would be in relation to the 23 years old offender who had exceptional antecedents and character. Public interest varies according to the time, place and circumstances of each case including its nature and prevalence. What may be of public interest in one place may differ from another. Similarly inducement to turn from criminal ways into honest living can take several forms and will have to depend to a greater extent on the attitude of the offender and his suitability for any particular type of reformation.

What now requires consideration is the manner in which public interest is affected by drug abuse. In *PP v. Loo Choon Fatt* [1976] 2 MLJ 256 Hashim Yeop A Sani J (as he then was) traced the gradual attitude of the legislature towards drug abuse as reflected in the various amendments made to the Act. His Lordship pointed out that each time the Act was amended the penalties attached to the various offences under it were enhanced. His Lordship then added at p. 257:

> It is common sense to say that behind these legislative exercises was the government realization albeit gradual, of the problem of drug abuse in this country, the degenerating effect of the misuse of dangerous drugs and the attendant dangers it has posed to society itself. The amendments passed by Parliament therefore reflect the public policy. It must be presumed that behind the public policy is the consideration of public interest.
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> The change in the attitude of the legislature itself during the last three years reflects the seriousness of the problem. In my view the courts will not be performing their functions honestly if the seriousness of the situation is not reflected in the sentence imposed if the sentence appears to defeat the object of the statute. This is not saying that the courts in the treatment of drug offences should at all times be severe. Each case has to be determined on its own merits. But in every case the courts must be realistic and rational.

What the learned judge said in 1976 is the same, if not worse, today. The seriousness of the drug menace must therefore be reflected in the sentence, depending on the circumstances of the case, so that the requirements of public interest can be served effectively. The corollary is a determination of whether the quantity of drugs involved in cases of drug abuse ought to affect the sentence to be passed in view of the fact that different penalties are prescribed in the Act dependent on the weight involved. I had the occasion to consider this aspect of sentencing in drug cases in *Zaidon Shariff v. PP* [1996] 4 CLJ 441 where I said at pp. 446 – 447,

> In my opinion the learned Magistrate's view that drug offences require a deterrent sentence is too wide and broad a statement. The appropriate sentence for each drug offence depends on its own peculiar circumstances. In particular the weight of the drugs found on a person plays a significant role in assessing sentence. In *Oloofen v. PP* [1964] MLJ 305 Wee Chong Jin CJ emphasised the consideration to be given to the quantity of drugs involved in drug offences in assessing sentence. The same guideline applies even to more serious drug offences. In *PP v. Ang Soon Huat* (*Mallal's Digest* 4th Ed 1994 Reissue Vol 5 No 2378) it was held that in drug trafficking cases the sentence should be proportionate to the gravity of the offence, which is the quantity of the drugs that was being trafficked. This is also manifested by the fact that the Dangerous Drugs Act 1952 (the Act) itself prescribes different penalties for drug offences depending on the weight of drugs involved. In *Mohamed bin Abdul Rahman v. PP* [1979] 1 MLJ 252 Syed Othman J (as he then was) substituted a sentence of six months imprisonment for possession of 0.10 grams of heroin with a fine of RM400 in default four months; imprisonment. Furthermore, the penalty under the Act is also dependent on the nature of the drugs involved. For example, an offence for possession of ganja attracts lighter sanctions than one for possession of heroin under the Act. As the dangerous drugs

> involved in this appeal is ganja and its weight is only 0.04 grams the learned Magistrate ought to have taken these factors into account in assessing sentence. Evidently, he was swayed by the overstatement that drug offences require a deterrent sentence.

It follows that the weight of the drugs is an indication of the gravity of the offence though, as I will explain in a later part of the judgment, it may be mitigated.

Another principle of sentencing, rendered significant by the facts of this case, is the effect of a guilty plea on the sentence to be imposed. It is settled law that a plea of guilt will operate as a mitigating factor in favour of an accused. Cases such as *Sau Soo Kim v. PP* [1975] 2 MLJ 134; *PP v. Sulaiman bin Ahmad* [1993] 1 MLJ 74 and *PP v. Ravindran & Ors* [1993] 1 MLJ 45 lay down the rule that an accused person should be given credit or discount for pleading guilty as it saves time and costs. However, that is only a statement of the general rule. The demands of public interest may, in the circumstances of a particular case, far outweigh any mitigating effect which might have been attached to an accused's guilty plea (see *Sim Gek Yong v. PP* [1995] 1 SLR 537). In *PP v. Govindnan a/l Chinden Nair* [1998] 2 MLJ 181 I considered the applicable principles governing a guilty plea at pp 191 – 192:

> It is generally accepted that an accused person should be given credit or discount for pleading guilty (see *PP v. Ravindran & Ors* [1993] 1 MLJ 45). However, as I had the occasion to observe in *Zaidon Shariff v. PP* [1996] 4 CLJ 441 at p 446:
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> > … Be that as it may, this rule is not a strict rule as the court may in the exercise of its discretion, refuse to grant any discount in appropriate cases (see *Lee Say & Ors v. PP* [1985] 2 CLJ 155).
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> In my opinion, a guilty plea ought to be considered in favour of the accused only when all other factors and circumstances surrounding the commission of the offence justify such a consideration. Its application in favour of the accused depends on the circumstances of each case (see *Wong Kai Chuen Philip v. PP* [1991] 1 MLJ 321). In *PP v. Low Kok Wai* [1988] 3 MLJ 123, Mohamed Dzaiddin J (as he then was) said at p. 124:
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> > … In the present case, the only mitigating factor is the accused's plea of guilty. It is a principle of sentencing that whenever possible the court should take into account as a mitigating factor the fact that the accused has pleaded guilty. The extent to which a plea of guilty is a mitigating factor must depend on the facts of each case, and it

> cannot be a powerful mitigating factor when effectively no defence to the charge was available to the accused (see *Archbold* (42nd Ed) para 4 – 480 citing *R v. Davis* [1980] 2 Cr App R(s) 168).

The severity of the offence committed may outweigh the mitigating effect of a guilty plea (see *Lee Say & Ors v. PP* [1985] 2 CLJ 155; *Loh Hock Seng v. PP* [1980] 2 MLJ 13; *PP v. Oo Leng Swee & Ors* [1981] 1 MLJ 247). Where public interest demands a deterrent sentence in the circumstances of a particular case, then the effect of such a plea must also give way. In this regard, I refer to *R v. Costen* [1989] II Cr App R (S) 182 where Lord Lane said at p 184:

> But there are certain exceptions, likewise well authenticated in the authorities, to that general rule that discount will be allowed for a plea of guilty. The first and most important exception is the protection of the public. Where it is necessary that a long sentence, if necessary the maximum sentence should be passed in order to protect the public, in those circumstances, a plea of guilty may not result in any discount.

Thus, there can be no automatic rule that a guilty plea on its own entitles an accused to a lesser punishment.

The principles of sentencing that I have discussed thus far were demonstrated in *Ang Chai Seng v. PP* [2000] 1 CLJ 213 where the accused was sentenced to 18 years' imprisonment and 10 strokes of the rattan for being in possession of 81.4 grammes of morphine even though he had pleaded guilty. In dismissing the appeal against sentence Haidar Mohd Noor JCA in writing for the Court of Appeal said at pp 215 – 216,

> The learned judge in his grounds of judgment applied the correct principle in the assessment of the sentence (see pp 125 – 127 of the appeal record). He was of the view that an offence under the Act is a serious offence and went on further to say that the amount of dangerous drugs in this case exceeds 15 times the minimum weight of five grammes as provided under s. 39A(2)(c) of the Act. We agree that the appellant committed a serious offence and the mitigating factors far outweighed in favour of the public interest. The sentence imposed may appear to be excessive having regard to the maximum sentence of 20 years' imprisonment prescribed by the Act but in our view the sentence, having regard to the seriousness of the offence of dangerous drugs and the public interest as opposed to the appellant's interest, is not manifestly excessive to warrant our intervention. It has to be noted that the legislature had thought it fit to increase the punishment for offences under s. 39A(2) of the Act from a maximum of 14 years' imprisonment to life imprisonment and the minimum term of imprisonment from three years to five years and the minimum strokes increased from six to ten strokes. The legislative exercise therefore denotes the government's

> concern of the problem of drug abuse in this country 'the degenerating effect of the misuse of dangerous drugs and the attendant dangers it has posed to society itself' per Hashim Yeop Sani J (as he then was) in *Public Prosecutor v. Loo Choon Fatt, supra*. Unless the courts take a firm stand in such offences the whole purpose of the legislature in increasing the punishment under s. 38A(2) of the Act would be lost (*Public Prosecutor v. Yeoh Eng Khuan* [1976] 1 MLJ 230).

It will be observed that the term of imprisonment imposed in *Ang Chai Seng v. PP* for being in possession of 81.4 grammes of morphine is almost the maximum provided by the Act. As I said earlier the quantity of drugs involved is an indication of the gravity of the offence. That leads to a consideration of the determinative effect of quantity on the imposition of the maximum term of imprisonment in a particular case, and, whether the precise amount necessary for that purpose can be quantified. As the Federal Court explained in *Loh Hock Seng & Anor v. PP* [1980] 2 MLJ 13 the prescribing of a maximum penalty in respect of an offence not only marks the limits of the court's discretionary power as to sentence, it also ordinarily prescribes what the penalty should be in the more serious types of cases falling within the relevant class of the offence meriting the maximum punishment prescribed. It is a long and well established principle of sentencing that the legislature in fixing the maximum penalty for a criminal offence intends it only for the worst cases (see *Sia Ah Kew & Ors v. PP* [1974] 1 MLJ 125; *R v. Harrison* [1909] 2 Cr App R 94). As to what amounts to a "worst case" scenario I refer to *R v. Ambler* [1976] Crim LR 266 where it was held that

> … it is to be borne in mind that when judges are asking themselves whether they should pass the maximum sentence, they should not use their imagination to conjure up unlikely worst possible kinds of cases. What they should consider is the worst type of offence which comes before the court and ask themselves whether the particular case they are dealing with comes within the broad band of that type.

In *R v. Tait and Bartley* [1979] 24 ALR 473 the Federal Court of Australia adopted the view of Burt CJ in *Bensegger v. R* [1979] WAR 65 where his Lordship said at p 68:

> A maximum sentence prescribed by statute is not reserved for the worst offence of the kind dealt with by it that can be imagined. If such were the case it could never be imposed as the addition of further non-existing but aggravating circumstances would never be beyond the reach of imagination. The true rule as I understand it is that the maximum sentence should be reserved for the worst type of case falling within the prohibition or … 'for the worst cases of the sort'. That expression should be understood to be

marking out a range and an offence may be within it notwithstanding the fact that it could have been worse than it was.

In *Sim Gek Yong v. PP* [1995] 1 SLR 537 Yong Pung How CJ in referring to these cases said at p 542:

The principles espoused above in *R v. Tait and Bartley* [1979] 24 ALR 473 and *Bensegger v. R* [1979] WAR 65 represent, in my view, the approach which should be adopted by a court towards the issue of maximum sentences. To restrict the maximum sentence to the 'worst case imaginable' would only invite an endless permutation of hypotheses. In the appellant's case, for instance, would the 'worst case imaginable' be one in which the customs officers had been injured? Or would it be one in which one of the officers had been killed? Or would it be one in which an innocent bystander has been fatally hit by the appellant's car? The possibilities are limitless and the uncertainty intolerable. All that a court can realistically do – and all that it should do – when deciding whether or not to impose a maximum sentence is to identify a range of conduct which characterizes the most serious instances of the offence in question. This would, as the court in *R v. Tait and Bartley* [1979] 24 ALR 473 pointed out, involve consideration both of the nature of the crime and of the circumstances of the criminal. Thus, taking the case of a conspiracy to defraud as an example, the fraud involved could be said to come within a band of fraud of the worst kind if it concerned a breach of trust; was in the multi-million dollar range; involved a person in a senior and responsible position; and had an element of public impact: see *AG v. Cheung Kai-man Dominic* [1987] HKLR 788.

Further guidance on the factors to be considered in deciding whether or not to impose the maximum sentence is provided by *Sentencing: State and Federal Law in Victoria*, 2nd Ed by Fox and Freiberg at p. 236:

While it is relevant to the imposition of the maximum that 'the circumstances of the crime would give rise to a sense of indignation in decent-thinking and decent-living citizens', a sense of indignation is not enough. In deciding whether or not to impose the maximum sentence, a sentencer is required to take into account a number of factors, including the intention of the perpetrator, the activities in which the perpetrator engaged, the total circumstances of the offence, the consequences of the behaviour, the offender's prior convictions, the prevalence of the offence and the absence of mitigating circumstances.

As the penalties for drug offences under the Act vary dependent on the weight of drugs involved the imposition of the maximum sentence in a particular case will be guided by the weight though it cannot be the yardstick in all cases. In saying this I refer to *R v. Laurentiu and Bechru*

[1992] 63 A Crim R 402 where Wood J observed that it is not entirely appropriate to place too much emphasis on the precise quantity of the drug involved, because in some cases the possession relates to that of an intermediary or principal in the course of an enterprise that is judged particularly criminal, whereas in other cases the possession may be that of the end user. Be that as it may, I must immediately observe that these mitigating circumstances may be displaced in a particular case where the quantity of drugs involved is large. This is because quantity can in fact supply evidence of motive (personal need versus greed), degree of involvement, and potential for damage to community as well as being an indicator of the gravity of the offence (see *Sentencing: State and Federal Law in Australia*, 2nd Edn by Fox and Freiberg p. 1009). A claim of possession for mere personal consumption may also be not sustainable if the street value of the drugs is disproportionate to the financial standing of an accused. The mitigating effect of merely being an intermediary may also be weakened if the quantity of drugs is large thereby indicating active involvement in the enterprise. The absence of any of these circumstances in favour of an accused would be an indication of his heinous intention and thereby militate against innocent possession with the result that the imposition of the maximum sentence may be justified. It is illogical to quantify the precise amount that would warrant such a sentence as it would only invite an endless permutation of hypotheses. It depends on the facts of each case. Thus even in cases where the quantity of drugs involved is the minimum prescribed by the Act, the maximum sentence may be appropriate if, *inter alia*, the drugs were not for personal consumption and the person charged is not an intermediary. If there are any further mitigating factors in favour of the accused, like a guilty plea, then they will have to be balanced against the public interest to be served. However, as I said earlier even if there are mitigating circumstances, such as a plea of guilty and co-operation with the authorities, if the circumstances of the offence are sufficiently heinous, a court is still warranted in imposing the maximum penalty (see also *R v. Wangsaimas, Vanit and Tensakum* [1996] 6 NTLR 14; *R v. Short* [1994] 49 FCR 556).

In this case the accused has pleaded guilty to having been in possession of 13,749.8 grammes of heroin. That is an unusually large amount of dangerous drugs. It is about 2,749 times the minimum weight of five grammes which attracts s. 39A(2)(b) of the Act. As I have mentioned earlier sentencing in drug cases should be proportionate to the gravity of the offence, which is dictated by the amount of drugs found in the possession of a person. The accused is of sufficient age to realise the seriousness of his conduct. Public interest therefore demands that the

accused be severely dealt with in the absence of any mitigating factors in his favour. There was no evidence to suggest that he was in possession of the drugs for his own use or that he was an intermediary. On the other hand the unusually large quantity of drugs is evidence of his motive and shows his degree of involvement. It constitutes a potential for damage to the community as well as being an indicator of the gravity of the offence. The circumstances of the case dictate that in the interests of the public the maximum prison term must be imposed on the accused. It follows that the guilty plea of the accused cannot operate as a mitigating factor in his favour. I did not consider his previous conviction as an aggravating factor as it happened a long time ago and is unrelated to his present offence. Accordingly, I convicted the accused and sentenced him to life imprisonment plus ten strokes of the rattan.